No. 93-1113

In The

Supreme Court of the United States

October Term, 1993

MANNIE CHAPMAN, et al.,

Petitioners,

v.

HERMAN M. KLEMICK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents HERMAN M. KLEMICK, and HERMAN M. KLEMICK, P.A., (hereinafter KLEMICK) respectfully restate the questions presented as follows:

1. Whether an attorney who represents a participant of a trust fund in the participant's personal injury action against a third party tortfeasor becomes a fiduciary of the trust fund under ERISA when, in settlement of his client's personal injury claim, the attorney receives funds to which the trust fund asserts subrogation rights?

2. Whether question No.1 presents a substantial issue of federal law such that pursuant to U.S. Supreme Court Rule 10.1(c) this Court should exercise discretionary jurisdiction and entertain this Petition for Writ of Certiorari?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs: Mannie Chapman, Jimmie Erskine, Dorothy Reid, James L. Woodall, R.P. Vinall, and Diane L. Ragone, as Trustees of the Laborers Health and Welfare Trust Fund of South Florida.

Defendants: Herman M. Klemick and Herman M. Klemick, P.A.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

ARGUMENT 3

THE ELEVENTH CIRCUIT'S OPINION APPROPRIATELY INTERPRETED THE ERISA STATUTE AND REVERSED THE DISTRICT COURT'S DANGEROUS EXTENSION OF ERISA FIDUCIARY LIABILITY 3

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987) 7

Brock v. Hendershott, 840 F.2d 339 (6th Cir. 1988)..... 8

Chapman v. Klemick, 3 F.3d 1508 (11th Cir. 1993)....3, 6

Donovan v. Mercer, 747 F.2d 304 (5th Cir. 1984) 8

Harvard Farms, Inc. v. National Casualty Co., 617 So.2d 400 (Fla. Dist. Ct. App. 1991)..... 7

Hotel Employees Union Welfare Fund v. Gentner, 815 F.Supp. 1354 (D. Nev. 1993)..... 4

Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988)..... 5

Teamsters Industrial Security Fund v. Salgado, No. 92-7082, Slip Op. (C.D. Cal. August 26, 1993) 4

Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991), cert. den'd. ___ U.S. ___ 113 S.Ct. 2927, 124 L. Ed. 678 (1993) 4, 5

Vest v. Gleason & Fritzshall, 832 F.Supp. 1216 (N.D. Ill. 1993) 4

OTHER AUTHORITIES

29 C.F.R. 2509.75-5..... 5

29 U.S.C. § 1002(21)(A)(i) 3

U.S. Supreme Court Rule 10.1(c) 2

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents HERMAN M. KLEMICK, et al., pray that this Court deny the Petition for Writ of Certiorari filed by the Petitioners MANNIE CHAPMAN, et al.

STATEMENT OF THE CASE

The Respondents have no quarrel with the presentation of the facts by the Petitioners. The underlying facts in this case have never really been in dispute. Indeed, the parties filed cross-motions for summary judgment in the

District Court. Those motions were submitted along with stipulated facts.

REASONS FOR DENYING THE WRIT

The Petitioners have suggested that this Court should exercise discretionary jurisdiction over this matter pursuant to U.S. Supreme Court Rule 10.1(c) because the Eleventh Circuit's decision "raises an important question of federal law that this court should resolve."[1] (Brief of Petitioner at Page 4). However, the Petitioner's brief is devoid of any type of true analysis of the relative importance of the question addressed by the Eleventh Circuit in its opinion.

In this brief we shall address why we believe that the Eleventh Circuit appropriately ruled in favor of Klemick and held him not to be a fiduciary of the Petitioner Plan. In doing so, we necessarily will address the second of our restated questions presented, i.e., whether this Court should exercise its discretionary jurisdiction over this matter.

[1] The Circuit Court decision does not conflict with any other Circuit Court decisions, or any decision of this Court; thus, the only possible basis for jurisdiction is U.S. Supreme Court Rule 10.1(c).

ARGUMENT

THE ELEVENTH CIRCUIT'S OPINION APPROPRIATELY INTERPRETED THE ERISA STATUTE AND REVERSED THE DISTRICT COURT'S DANGEROUS EXTENSION OF ERISA FIDUCIARY LIABILITY

The Eleventh Circuit began with an analysis of the statutory definition of "fiduciary" under ERISA. See 29 U.S.C. § 1002(21)(A).[2] The District Court had relied upon § 1002(21)(A)(i) when it held that Klemick was a fiduciary because he had exercised "authority or control respecting management or disposition of [plan] assets."

The Eleventh Circuit was critical of the Plan's argument that the $25,000 which Klemick had obtained from the third party tortfeasor on behalf of his client Wilson (a plan participant) constituted plan assets in the first place.[3] Rather, the Eleventh Circuit correctly recognized that "what the trust fund had by virtue of its agreement with Wilson was a contractual 'claim' for reimbursement of the $28,000 in medical expenses it had paid on behalf of Wilson." *Chapman*, 3 F.3d at 510. However, the court's characterization of those funds as other than plan assets was not the basis of its holding in this case. Rather, the court determined that the term "fiduciary" under ERISA simply could not be construed to apply to a personal injury attorney who had been retained by a plan participant.

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[2] The Eleventh Circuit's opinion, *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993), is reprinted in its slip opinion format in the Petitioner's appendix, pp. 1a-9a.

[3] The stipulated facts demonstrate that the $25,000 recovery was the extent of insurance coverage available from the third party tortfeasor who injured Wilson.

In doing so the Court pointed out that it was unaware of any case where a lawyer for an ERISA plan *participant*, as opposed to a lawyer for an ERISA *plan*, had been alleged to be an ERISA fiduciary. Indeed, other than the erroneous District Court opinion which the Eleventh Circuit has now reversed, there are no *published* decisions which follow the District Court's rationale which held Klemick to be a fiduciary.

In this regard, it must be noted that although the Petitioners have cited (and included in their Appendix) a copy of the *unpublished* decision in *Teamsters Industrial Security Fund v. Salgado*, No. 92-7082, Slip Op. (C.D. Cal. August 26, 1993), the Petitioners have completely ignored two *published* district court opinions which were very critical of the district court opinion in this case. *See Vest v. Gleason & Fritzshall*, 832 F.Supp. 1216 (N.D. Ill. 1993); and *Hotel Employees Union Welfare Fund v. Gentner*, 815 F.Supp. 1354 (D. Nev. 1993).[4] These decisions criticized the District Court's opinion in this case for much the same reasons that the Eleventh Circuit reversed the District Court's opinion.

Relying upon its observation in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), cert. den'd., ___ U.S. ___ 113 S.Ct. 2927, 124 L. Ed. 678 (1993), that "the discretionary role needed to support fiduciary status must amount to more than a theoretical contrivance," the court went on to distinguish Klemick, a personal injury attorney representing a trust fund participant, from the attorneys involved

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[4] The Petitioners are clearly aware of these authorities, as they were cited to the Eleventh Circuit Court and to the Petitioners in notices of supplemental authority.

in the *Useden* case, who had been held not to be fiduciaries – *even though they had been retained by the trust fund to render both business and legal advice to the trust fund.* The Eleventh Circuit went on to rely upon the very federal regulations which the Petitioners purport to rely upon before this Court, i.e., 29 C.F.R. 2509.75-5, for the proposition that *an attorney who renders legal services to an employee benefit plan* ordinarily would not become a plan fiduciary where those services amount to no more than an attorney's "usual professional functions." The underscored portion of the previous sentence highlights the obvious – that 29 C.F.R. applies only to attorneys hired by an ERISA plan, not to attorneys hired by a plan participant.

The purpose behind that federal regulation is obvious. No competent attorney would ever agree to provide services for an ERISA plan if the attorney thereby automatically became subject to ERISA liability as a fiduciary. As the Eleventh Circuit noted in *Useden*, "ERISA does not contemplate an allocation of liability that will deter consultants such as attorneys from assisting plans." 947 F.2d at 1578.

If, as in *Useden* and *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), attorneys who have actually been *retained* by ERISA plans do not automatically become fiduciaries of their client plans, it follows that an attorney such as Klemick who has not been retained by the plan – but who instead is in an adversarial position vis-a-vis the plan by virtue of his representation of a plan participant – cannot possibly be construed to be an ERISA fiduciary. Indeed, in *Nieto v. Ecker*, the Ninth Circuit held that an attorney who had been retained by a group of ERISA plans to

collect delinquent contributions from member employers did not thereby acquire fiduciary status. Such an attorney inarguably has much greater control over "plan assets" than a plan participant's personal injury attorney, and also inarguably has no conflict of interest by virtue of being labelled a "fiduciary" under ERISA.

As the Eleventh Circuit pointed out, the arguments against imposing ERISA fiduciary liability upon an attorney hired by a plan participant are "even more compelling" than those against imposing fiduciary status on attorneys who render advice or provide services to an ERISA plan itself. *Chapman*, 3 F.3d at 1511.

Although, as we have pointed out, the federal regulation in question does not by its own terms apply to an attorney who has not been retained by an ERISA plan, the Eleventh Circuit nevertheless proceeded to analyze Klemick's behavior in light of a "pre-existing framework of policies, practices and procedures." In doing so the court looked to an attorney's ethical obligation to his or her client.

The court's initial focus was on the specific rule of professional conduct which governs Klemick's behavior, i.e., Florida Rule of Professional Conduct 4-1.7(b) which provides that: loyalty to a client is . . . impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest." As the court went on to note, Klemick simply could not serve two masters. The conflict which the Petitioners' argument (and the District Court's Opinion) would place upon

lawyers such as Klemick is not a theoretical conflict; it is palpable and unavoidable.

The Petitioners suggest that the Eleventh Circuit "ignored" a competing rule of professional conduct, Rule 4-1.5(c), which requires the safekeeping of monies about which there is a dispute over ownership. We disagree. First, the court did not ignore the comment because it was not presented to the court below by the Petitioners. Second, even if Klemick could arguably be charged with having ignored — or even violated — the latter rule, this type of violation could not provide a basis for civil liability. *See Harvard Farms, Inc. v. National Casualty Co.*, 617 So.2d 400, 401 n.1 (Fla. Dist. Ct. App. 1991) (noting that the preamble to the Rules Regulating The Florida Bar states that a violation of a rule should not give rise to a cause of action; nor should it create a presumption that a legal duty has been breached).

The Petitioners suggest that this Rule of Professional Conduct should have caused Klemick to deposit the funds into the registry of the appropriate court so that the subrog tion dispute could be formally adjudicated. However, even if we assume that this would have been the more prudent advice for Klemick to give to his client the failure of Klemick to offer that advice and the refusal of Wilson to take that course of action would not transform Klemick into a fiduciary under the ERISA statute, or otherwise justify this rather extraordinary claim by someone other than Mr. Klemick's own client. *Cf. Angel, Cohen & Rogovin v. Oberon Investment, N.V.*, 512 So.2d 192 (Fla. 1987) (party not in privity with attorney may not maintain negligence action against attorney).

Finally, the Eleventh Circuit Court did not "completely ignore" ERISA's broad definition of "fiduciary", as the Petitioners allege at Page 6 of their Petition. Indeed, the court addressed the cases cited by the Petitioners and the District Court, i.e., *Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988), and *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984) which hold that the drafters of ERISA intended fiduciary liability to be broadly construed. However, as the Court noted, even a broad construction has limits. The Court correctly held that the District Court's judgment transgressed those limits; the District Court's opinion would have had a disastrous effect not only upon an ERISA participant's ability to obtain competent counsel, but upon ERISA plans themselves.

The fact of the matter is that in this case the Plan was not reimbursed because the tortfeasor who injured the Plan participant Wilson was grossly underinsured. In many cases there will be more than sufficient funds available from a tortfeasor to insure complete or at least substantial repayment of plan assets. However, if a plan participant is unable to obtain competent counsel to pursue recovery of those funds because personal injury attorneys do not wish to subject themselves to possible ERISA fiduciary status (for any number of foreseeable and unforeseeable transgressions) then ERISA plans will suffer.

CONCLUSION

This Court should decline to exercise jurisdiction over this matter. First, the Circuit Court's opinion is appropriate and sound from a legal and a practical standpoint. Had the District Court's opinion been allowed to stand, it would have wreaked havoc with the relationship between personal injury attorneys and their clients who happen to be participants of ERISA trust funds or plans. Second, the term "fiduciary" as it is utilized in the ERISA statute simply cannot be stretched beyond all reasonable bounds to include an attorney such as Klemick who was not retained by the Trust Fund, but rather found himself in an adversarial position with the Trust Fund vis-a-vis the subrogation dispute that arose between his client and the Trust Fund. There is no conflict between the Circuit Court's opinion and any other reported decision; nor is the issue – particularly because it was correctly decided below – of such overwhelming importance as to justify jurisdiction before this Court.

Respectfully submitted,

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